UNITED MALAYAN BANKING CORP. BHD.

v.

SYKT. PERUMAHAN LUAS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
EDGAR JOSEPH JR J
[PENANG ORIGINATING SUMMONS NO. 31-855-86]
15 JANUARY 1988

CIVIL PROCEDURE: *Application to set aside order of sale - Preliminary objection raised - Court functus officio once order of sale perfected - Defendant is therefore required to appeal - Have to comply with s. 68(2) of the Courts of Judicature Act 1964 and r. 56 of the Rules of the Supreme Court 1980 - Application for leave and for extension of time - Whether Court can set aside order made on an ex parte application by originating summons.*

This was an application by way of summons-in-chambers by the defendant to set aside an order of sale of a piece of land executed by the defendant in favour of the plaintiff by way of security for an overdraft facility.

The plaintiff at the outset of the hearing took the preliminary objection that the Court was *functus officio* once the order of sale was perfected and that the defendant's remedy was by way of appeal. Accordingly, it was submitted that in order to appeal, the defendant had to comply with the formalities prescribed by s. 68(2) of the Courts of Judicature Act 1964 and that the period of appeal, limited to one month under r. 56 of the Rules of the Supreme Court 1980, had already expired. Therefore it was submitted that the defendant had to apply to the Supreme Court for extension of time to appeal and for leave to appeal.

The Counsel for the defendant submitted that an order made on an application by way of originating summons is an *ex parte* order which may be varied or set aside on application by any person affected by it. It was also submitted by the defendant's Counsel that the Court in exercise of its inherent jurisdiction could set aside its own order and that an appeal was therefore unnecessary.

Held:

[1] The defendant's application was perfectly competent and the Court was not *functus officio* but had full powers to vary or revoke the order of sale as it deemed fit according to O. 28 r. 4(1) of the Rules of the High Court 1980 which *inter alia* provides that any order made by the Court upon an application by originating summons may be varied or revoked by a subsequent order of the Court on such terms as it thinks fit.

[2] An order which can be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. The Court in its inherent jurisdiction can set aside its own order and therefore an appeal from the order is not necessary.

[Preliminary objection overruled. Hearing of application to proceed on the merits.]

Cases referred to:

United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd. [1968] 2 MLJ 85
Craig v. Kanseem [1943] 1 All ER 108
Hamzah bin Abdul Majid & Anor. v. Sungei Way Leasing Sdn. Bhd. [1986] CLJ (Rep) 152

Legislation referred to:
Courts of Judicature Act 1964, s. 68(2)
Rules of the High Court 1980, O. 28 r. 4(1), O. 32 r. 5(3)
Rules of the Supreme Court 1980, r. 56
Rules of the Supreme Court [Sing], O. LIII r. 4(1)

For the plaintiff - K. Balasundram; M/s. Balasundram & Co.
For the defendant - N.G. Sivanandan (Dominic Y.H. Lai with him); M/s. Presgrave & Matthews

JUDGMENT

Edgar Joseph Jr J:

This was a defendant's application by way of summons-in-chambers to set aside an order of sale of certain land comprised in Lot 40(2) s. 14, Bandar Georgetown, Penang, NED, Penang the subject matter of a charge bearing Presentation No. 15364/83 Vol. 285, Folio 156 executed by the defendant in favour of the plaintiff by way of security for an overdraft facility upon the following grounds:

(i) that Charge Presentation No. 15364/83 Vol. 285, Folio 156 over Lot No: 40(2), s. 14, Bandar Georgetown, Penang, NED, Penang is void by reason that at the time of the creation and/or execution thereof by the defendants on 11 February 1983 the defendants were not the proprietors of the said Lot No: 40(2) and in the circumstances did not have the legal capacity to create and/or execute the said charge; and/or

(ii) that on 11 February 1983 the said Lot No: 40 (2) was held under leasehold Document of Qualified Title No. HS(D) 19, s. 14, Bandar Georgetown, NED, Penang with a restriction in interest preventing the charging of the said land without the written sanction of the State Authority and that such written sanction at the material time had not been had and obtained; and/or

(iii) that the provision of s. 257(2) of the National Land Code have not been complied with in that the Court has not directed that the different lots be offered for sale individually and in a specified order and also that in the event of the price fetched by one or more of them exceeds the amount specified in the Order, the other or others shall be withdrawn from the sale and shall cease to be subject to the order.

At the outset of the hearing, earlier today, Counsel for the plaintiff took the preliminary objection that the Court was *functus officio* once the order of sale was perfected and so the defendant's remedy was by way of appeal. Accordingly, it was submitted that in order to appeal, the defendant had to comply with the formalities prescribed by s. 68(2) of the Courts of Judicature Act 1964, which provides that:

> No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.

But, said Counsel, the order of sale having been made on 9 July 1987, the defendant not having complied with the formalities prescribed by s. 68(2) and the period of appeal of one month limited under r. 56 of the Rules of the Supreme Court 1980, having expired, the defendant's remedy was to apply to the Supreme Court for extension of time to appeal and for leave.

In reply, Counsel for the defendant contended that an order made on an Originating Summons, even though duly served on a defendant, who fails to enter an appearance and is absent at the hearing is, nevertheless, an *ex parte* order. My attention was drawn to the Singapore Court of Appeal case of *United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd.* [1968] 2 MLJ 85 where Chua J delivering the judgment of the Court said this:

> The first question of consideration is whether or not the order made on the originating summons was an *ex parte* order and comes within O. LIII r. 4(1).
>
> The originating summons in this case was served on Tay Soo Tong by substituted service and he had made no appearance and in such a case O. LI r. 16 provides:
>
> > Where any party who had been duly served fails to attend at the time appointed for the hearing, the Judge may proceed *ex parte*, if he thinks it expedient to do so and may require such evidence of service as he thinks fit.
> >
> > It is clear then that a Judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of O. LIII r. 4(1).

Order LIII r. 4(1) of the Singapore Rules of the Supreme Court, then in force, was as follows:

> Any order made *ex parte* may be varied or set aside on application, by any person affected by it, to a Judge, on such terms as to costs or otherwise as to the Judge seem fit.

The relevant Singapore Rule would thus seem to be generally in *pari materia* with O. 28 r. 4(1) of our Rules of the High Court 1980, which provides:

> The Court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just.

On this basis, it was argued that the defendant's application was perfectly competent and the Court was not *functus officio* but had full powers to vary or revoke the order of sale if it deemed fit to do so having regard to the provisions of O. 28 r. 4(1) of the Rules of The High Court 1980.

In any event, it was argued that when, as here, the defendant was contending that the order of sale was a nullity, the Court could, in the exercise of its inherent jurisdiction, set aside its own order and an appeal was therefore unnecessary. In support of this latter proposition the following passage in the judgment of Greene MR in *Craig v. Kanseem* [1943] 1 All ER 108 @ 113 was cited to me:

> ... Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the Court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.

For the reasons urged by Counsel for the defendant, I had no hesitation in overruling the preliminary objection.

I might as well add that I did not consider that O. 32 r. 5(3) of the Rules of the High Court 1980, which provides:

> Where the Court hearing a summons proceeded in the absence of a party, then, provided that any order made on the hearing has not been perfected, the Court, if satisfied that it is just to do so, may rehear the summons, and

relied upon by Counsel for the plaintiff, had any relevance to the issue which arose before me because I was **not** concerned here with an application **to rehear** a summons but an application **to revoke an *ex parte* order**. Nor, for that matter, did I consider the case of *Hamzah bin Abdul Majid and Anor. v. Sungei Way Leasing Sdn. Bhd.* [1986] CLJ (Rep) 152 of any relevance because there the decision in question was one arrived at after an *inter partes* hearing so that O. 28 r. 4(1) was without application.

In the circumstances, I directed that the hearing of the application should proceed on the merits.

Also found at [1988] 1 CLJ 577